UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

KNORR-BREMSE AG

and

WESTINGHOUSE AIR BRAKE TECHNOLOGIES CORPORATION,

Defendants.

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On April 3, 2018, the United States filed a civil antitrust Complaint alleging that Defendants Knorr-Bremse AG ("Knorr") and Westinghouse Air Brake Technologies Corporation ("Wabtec") entered into unlawful agreements not to poach each other's employees in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Specifically, the Complaint alleges that Knorr and Wabtec entered into a series of agreements not to solicit, recruit, hire without prior approval, or otherwise compete for employees (collectively, "No-Poach Agreements"). In

addition, the Complaint alleges that Knorr and Wabtec separately entered into No-Poach Agreements with Faiveley Transport North America, a U.S. subsidiary of Faiveley Transport S.A. ("Faiveley"), before Faiveley was acquired by Wabtec in November 2016. The No-Poach Agreements were not reasonably necessary to any separate, legitimate business transaction or collaboration between the companies. According to the Complaint, the Defendants' No-Poach Agreements unlawfully allocated employees between the companies and are per se unlawful restraints of trade that violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

At the same time the Complaint was filed, the United States also filed a Stipulation and Order and proposed Final Judgment, which would remedy the violation by enjoining the Defendants from entering into, maintaining, or enforcing any No-Poach Agreements, subject to limited exceptions. The proposed Final Judgment also requires the Defendants to take specific compliance measures and to cooperate in any investigation or litigation examining whether or alleging that the Defendant entered into a No-Poach Agreement with any other person in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

The United States and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants

Knorr is a privately-owned German company with its headquarters in Munich, Germany. It is a global leader in the development, manufacture, and sale of rail and commercial vehicle equipment. In 2017, Knorr had annual revenues of approximately $7.7 billion. Knorr holds

several wholly-owned rail subsidiaries in the United States. Knorr Brake Company is a Delaware corporation with its headquarters in Westminster, Maryland. It manufactures train control, braking, and door equipment used on passenger rail vehicles. New York Air Brake Corporation is a Delaware corporation with its headquarters in Watertown, New York. It manufactures railway air brakes and other rail equipment used on freight trains. Knorr Brake Company and New York Air Brake Corporation are wholly-owned subsidiaries of Knorr.

Wabtec is a Delaware corporation headquartered in Wilmerding, Pennsylvania. With over 100 subsidiaries, Wabtec is the world's largest provider of rail equipment and services with global sales of $3.9 billion in 2017. Wabtec Passenger Transit is a business unit of Wabtec that develops, manufactures, and sells rail equipment and services for passenger rail applications. It is based in Spartanburg, South Carolina.

On November 30, 2016, Wabtec acquired Faiveley, which had been a French société anonyme based in Gennevilliers, France. Before the acquisition, Faiveley was the world's third-largest rail equipment supplier behind Wabtec and Knorr. Faiveley had employees in 24 countries, including at six U.S. locations. It developed, manufactured and sold passenger and freight rail equipment to customers in Europe, Asia, and North America, including the United States, with revenues of approximately €1.2 billion in 2016. In the United States, Faiveley conducted business primarily through Faiveley Transport North America, a wholly-owned subsidiary of Faiveley and a New York corporation headquartered in Greenville, South Carolina.

B. Defendants Enter into and Maintain No-Poach Agreements

The Complaint alleges that Knorr and Wabtec (which now includes Faiveley) are the world's largest rail equipment suppliers and each other's top rival for the development, manufacture, and sale of equipment used in freight and passenger rail applications. Knorr and

Wabtec also compete with one another and with firms at other tiers of the rail industry supply chain to attract, hire, and retain skilled employees by offering attractive salaries, benefits, training, advancement opportunities, and other favorable terms of employment.

The Complaint further alleges that there is high demand for and limited supply of skilled employees who have rail industry experience. As a result, firms in the rail industry can experience vacancies of critical roles for months while they try to recruit and hire an individual with the requisite skills, training, and experience for a job opening. Employees of other rail industry participants, including the employees of Knorr's and Wabtec's customers, competitors, and suppliers, are key sources of potential talent to fill these openings.

According to the Complaint, firms in the rail industry employ a variety of recruiting techniques, including using internal and external recruiters to identify, solicit, recruit, and otherwise help hire potential employees. Rail companies also receive direct applications from individuals interested in potential employment opportunities. Directly soliciting employees from another rail industry participant is a particularly efficient and effective method of competing for qualified employees. Soliciting involves communicating directly—whether by phone, e-mail, social and electronic networking, or in person—with another firm's employee who has not otherwise applied for a job opening. Firms in the rail industry rely on direct solicitation of employees of other rail companies because those individuals have the specialized skills necessary for the vacant position and may be unresponsive to other methods of recruiting. The Complaint alleges that the rail industry is an insular one where employees at different firms form long-term relationships and often look to their professional networks to fill a vacancy.

According to the Complaint, in a competitive labor market, rail industry employers compete with one another to attract highly-skilled talent for their employment needs. This

competition benefits employees because it increases the available job opportunities that employees learn about and improves employees' ability to negotiate for better salaries and other terms of employment. The Complaint alleges that, over a period spanning several years, Wabtec, Knorr, and Faiveley entered into similar No-Poach Agreements with one another to eliminate competition between them for employees. These agreements were executed and enforced by senior company executives and reached several of the companies' U.S. subsidiaries and business units. The Complaint alleges that Knorr's and Wabtec's No-Poach Agreements restrained competition for employees and disrupted the normal bargaining and price-setting mechanisms that apply in the labor market. The Complaint further alleges that the No-Poach Agreements were not reasonably necessary to any separate, legitimate business transaction or collaboration between the companies.

1. Wabtec – Knorr Agreements

According to the Complaint, Wabtec and Knorr entered into pervasive No-Poach Agreements that spanned multiple business units and jurisdictions. Senior executives at the companies' global headquarters as well as their respective U.S. passenger and freight rail businesses entered into No-Poach Agreements that involved promises and commitments not to solicit or hire one another's employees. As alleged in the Complaint, the No-Poach Agreements primarily affected recruiting for project management, engineering, sales, and corporate officer roles and restricted each company from soliciting current employees from the other company. The Complaint further alleges that, at times, these agreements were operationalized as agreements not to hire current employees from one another without prior approval.

According to the Complaint, beginning no later than 2009, Wabtec's and Knorr Brake Company's most senior executives entered into an express No-Poach Agreement and then

actively managed it with each other through direct communications. The Complaint alleges that in a letter dated January 28, 2009, a director of Knorr Brake Company wrote to a senior executive at Wabtec's headquarters, "[Y]ou and I both agreed that our practice of not targeting each other's personnel is a prudent cause for both companies. As you so accurately put it, 'we compete in the market.'" As alleged in the Complaint, that agreement was well-known to senior executives at the parent companies, including top Knorr executives in Germany who were included in key communications about the No-Poach Agreement. The Complaint further alleges that in furtherance of their agreement, Wabtec and Knorr Brake Company informed their outside recruiters not to solicit employees from the other company. In some instances, Wabtec and Knorr Brake Company's No-Poach Agreement foreclosed the consideration of an unsolicited applicant employed by the other company without prior approval of the other firm. Knorr and Wabtec's No-Poach Agreements also extended to the companies' U.S. freight rail businesses.

According to the Complaint, Knorr's and Wabtec's senior executives actively policed potential breaches of their companies' No-Poach Agreements and directly communicated with one another to ensure adherence to the agreements.

2. Knorr-Faiveley Agreement

As alleged in the Complaint, beginning no later than 2011, senior executives at Knorr Brake Company and Faiveley Transport North America reached an express No-Poach Agreement that involved promises and commitments to contact one another before pursuing an employee of the other company. The Complaint alleges that in October 2011, a senior executive at Knorr Brake Company explained in an e-mail to a high-level executive at Knorr-Bremse AG that he had a discussion with an executive at Faiveley's U.S. subsidiary that "resulted in an agreement between us that we do not poach each other's employees. We agreed to talk if there

was one trying to get a job[.]" Executives at Knorr Brake Company and Faiveley's U.S. subsidiary actively managed the No-Poach Agreement with each other through direct communications. The Complaint specifically alleges that in or about 2012, a senior executive at Knorr Brake Company discussed the companies' No-Poach Agreement with an executive at Faiveley Transport North America. This discussion took place at a trade show in Berlin, Germany. Subsequently, the executives enforced the No-Poach Agreement with each other through direct communications. This No-Poach Agreement was known to other senior executives at the companies, who directly communicated with one another to ensure adherence to the agreement.

As alleged in the Complaint, the companies continued their No-Poach Agreement until at least 2015. After Wabtec announced its proposed acquisition of Faiveley in July 2015, a high-level Knorr executive directed the company's recruiters in the United States and other jurisdictions to raid Faiveley for high-potential employees.

3. Wabtec-Faiveley Agreement

The Complaint alleges that beginning no later than January 2014, senior executives at Wabtec Passenger Transit and Faiveley Transport North America entered into a No-Poach Agreement in which the companies agreed not to hire each other's employees without prior notification to and approval from the other company. According to the Complaint, Wabtec Passenger Transit and Faiveley Transport North America executives actively managed and enforced their agreement with each other through direct communications. The Complaint specifically alleges that in an internal e-mail to his colleagues, a Wabtec Passenger Transit executive explained that a candidate "is a good guy, but I don't want to violate my own agreement with [Faiveley Transport North America]."

The Complaint alleges that in July 2015, Wabtec and Faiveley publicly announced their intent to merge. Wabtec closed its acquisition of Faiveley on November 30, 2016. Presently, Faiveley is a wholly-owned subsidiary of Wabtec.

C. Defendants' No-Poach Agreements Were Per Se Unlawful Market Allocation Agreements under Section 1 of the Sherman Act

No-Poach Agreements that are not reasonably necessary to any separate, legitimate business transaction or collaboration are properly considered per se unlawful market allocation agreements under Section 1 of the Sherman Act. Section 1 outlaws any "contract, combination . . . , or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Courts have long interpreted this language to prohibit only "unreasonable" restraints of trade. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988). Most restraints are analyzed under the rule of reason, which requires the plaintiff to present evidence of a restraint's anticompetitive effects and permits the defendant to present procompetitive justifications. Ultimately, the fact-finder weighs all the circumstances to determine whether the restraint is one that suppresses competition or promotes it. *See Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918).

"The rule of reason does not govern all restraints," however. *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Rather, "some types of restraints on trade have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se," *State Oil Co. v. Khan*, 522 U.S. 3, 3 (1997), and thus "illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use," *Northern Pac. Ry. v. United States*, 356 U.S. 1, 545 (1958). It is well established that naked restraints of competition among horizontal competitors, such as price-fixing or market allocation agreements, are per se unlawful. *See United States v. Socony-*

Vacuum Oil Co., 310 U.S. 150, 218 (1940); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 48-50 (1990) (per curiam).[1]

Market allocation agreements cannot be distinguished from one another based solely on whether they involve input or output markets.[2] Nor are labor markets treated differently than other input markets under antitrust law. "[A]n agreement among employers that they will not compete against each other for the services of a particular employee or prospective employee is, in fact, a service division agreement, analogous to a product division agreement." *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013) (citation omitted); *see also* IIA Phillip E. Areeda et al., Antitrust Law, ¶ 352c at 288–89 (4th ed. 2014) ("Antitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services.").

[1] Under the ancillary restraints doctrine, an agreement ordinarily condemned as per se unlawful is "exempt from the per se rule" if it is ancillary to a separate, legitimate procompetitive venture between the competitors and reasonably necessary to achieve the procompetitive benefits of that venture. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (a customer allocation agreement is ancillary only if it is "subordinate and collateral to a separate, legitimate transaction" and reasonably necessary to make that separate transaction "more effective [or efficient] in accomplishing its purpose"); *see Texaco Inc. v. Dagher*, 547 U.S. 1, 7-8 (2006).

[2] In similar circumstances, the Sixth Circuit has held that an agreement among competitors not to solicit one another's customers was a per se violation of the antitrust laws. *See U.S. v. Cooperative Theaters of Ohio, Inc.*, 845 F.2d 1367 (6th Cir. 1988) (finding that two movie theater booking agents agreed to refrain from actively soliciting each other's customers). In particular, the Sixth Circuit found the defendants' "no-solicitation agreement" was "undeniably a type of customer allocation scheme which courts have often condemned in the past as a per se violation of the Sherman Act." *Id.* at 1373.

Consistent with these precedents, the United States has repeatedly challenged No-Poach Agreements that are not reasonably necessary to any separate, legitimate business transaction or collaboration as per se unlawful restraints of trade. For example, in September 2010, the United States charged six of the largest U.S. high technology companies—Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., and Pixar—with per se violations of Section 1 for entering into bilateral agreements to prohibit each company from "cold calling" the other company's employees. Complaint, *United States v. Adobe Sys., Inc.*, No. 10-cv-1629 (D.D.C. Oct. 1, 2010).[3] In December 2010, the United States charged Lucasfilm Ltd. with a per se violation of Section 1 for entering an agreement with Pixar to prohibit cold calling of each other's employees and setting forth anti-counteroffer rules that restrained bidding for employees. Complaint, *United States v. Lucasfilm Ltd.*, No. 10-cv-2220 (D.D.C. Dec. 28, 2010).[4] And in November 2012, the United States charged eBay with a per se violation of Section 1 for entering an agreement with Intuit, pursuant to which eBay and Intuit agreed not to recruit each other's employees and eBay agreed not to hire Intuit employees, including those that approached eBay for a job. *See* Complaint, *United States v. eBay, Inc.*, No. 12-cv-5869 (N.D. Cal. Nov. 16, 2012).[5] In each case, the defendants ultimately agreed to consent decrees terminating their unlawful agreements.[6]

Beginning in October 2016, the department has made clear that it intends to bring criminal, felony charges against culpable companies and individuals who enter into naked No-

[3] The complaint is available at https://www.justice.gov/atr/case/us-v-adobe-systems-inc-et-al.

[4] The complaint is available at https://www.justice.gov/atr/case/us-v-lucasfilm-ltd.

[5] The complaint is available at https://www.justice.gov/atr/case/us-v-ebay-inc.

[6] The Division's settlement in *eBay* followed the district court's denial of eBay's motion to dismiss. *See United States v. eBay, Inc.*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013).

Poach Agreements.[7] No-Poach Agreements eliminate competition in the same irredeemable way as a customer- or market-allocation agreement, and the department has long prosecuted such agreements as hardcore cartel conduct. The Division has reiterated this prosecutorial intent in subsequent public statements and indicated that it may proceed criminally where the underlying No-Poach Agreements began or continued after October 2016.[8] As a matter of prosecutorial discretion, the Division will pursue No-Poach Agreements entered into and terminated before that date through civil actions for equitable relief.

[7] *See, e.g.*, Andrew C. Finch, Acting Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, "Antitrust Enforcement and the Rule of Law," Remarks at Global Antitrust Enforcement Symposium (Sept. 12, 2017), *available at* https://www.justice.gov/opa/speech/file/996151/download ("The Guidelines cautioned that naked agreements among employers not to recruit certain employees, or not to compete on employee compensation, are per se illegal and may thereafter be prosecuted criminally."); Renata B. Hesse, Acting Asst. Att'y Gen. for Antitrust, U.S. Dep't of Justice, "The Measure of Success: Criminal Antitrust Enforcement during the Obama Administration," Remarks at 26th Annual Golden State Antitrust, UCL and Privacy Law Institute (Nov. 3, 2016), *available at* https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-remarks-26th ("Naked wage-fixing or no-poach agreements eliminate competition in the same irredeemable way as per se unlawful price-fixing and customer-allocation agreements do. So we will approach them the same way, using our professional judgment, and considering all the factors that ordinarily weigh on our discretion as criminal prosecutors."); Press Release, U.S. Dep't of Justice, *Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation* (Oct. 20, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals ("Going forward, the Justice Department intends to criminally investigate naked no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between the employers.").

[8] *See* Andrew C. Finch, Principal Deputy Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, "Trump Antitrust Policy After One Year," Remarks at the Heritage Foundation (Jan. 23, 2018), *available at* https://www.justice.gov/opa/speech/file/1028906/download ("In October 2016, the Division issued guidance reminding the business community that no-poach agreements can be prosecuted as criminal violations. For agreements that began *after* the date of that announcement, or that began before but *continued after* that announcement, the Division expects to pursue criminal charges.").

As described in the Complaint, Knorr's and Wabtec's No-Poach Agreements were naked restraints on competition for employees and were not reasonably necessary to any separate, legitimate business transaction or collaboration between the firms. The No-Poach Agreements suppressed and eliminated competition to the detriment of employees by depriving workers of competitively important information that they could have leveraged to bargain for better job opportunities and terms of employment. In doing so, the No-Poach Agreements eliminated significant competition between the firms to attract employees in the rail industry. Accordingly, they are per se unlawful horizontal market allocation agreements under Section 1 of the Sherman Act. The United States has pursued the agreements at issue in the Complaint by civil action rather than as a criminal prosecution because the United States uncovered and began investigating the agreements, and the Defendants terminated them, before the United States had announced its intent to proceed criminally against such agreements.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment sets forth (1) conduct in which the Defendants may not engage; (2) conduct in which the Defendants may engage without violating the proposed Final Judgment; (3) certain actions the Defendants are required to take to ensure compliance with the terms of the proposed Final Judgment; (4) the Defendants' obligations to cooperate with the United States in its investigations of No-Poach Agreements; and (5) oversight procedures the United States may use to ensure compliance with the proposed Final Judgment.

A. Prohibited Conduct

Section IV of the proposed Final Judgment prohibits the Defendants from attempting to enter into, entering into, maintaining, or enforcing any No-Poach Agreement or No-Poach Provision. Paragraph II(E) of the proposed Final Judgment defines "No-Poach Agreement" or

"No-Poach Provision" as "any Agreement, or part of an Agreement, among two or more employers that restrains any person from cold calling, soliciting, recruiting, hiring, or otherwise competing for (i) employees located in the United States being hired to work in the United States or outside the United States or (ii) any employee located outside the United States being hired to work in the United States."[9] Taken together, these provisions will terminate any existing No-Poach Agreements to which either Defendant is currently a party and prohibit each Defendant from entering into any No-Poach Agreements in the future.

B. Conduct Not Prohibited

Paragraph V(A) of the proposed Final Judgment provides that nothing in Section IV shall prohibit a Defendant from attempting to enter into, entering into, maintaining, or enforcing a reasonable agreement not to solicit, recruit, or hire employees that is ancillary to a legitimate business collaboration. Paragraph V(B) requires that all Agreements that satisfy Paragraph V(A) that are entered into, renewed, or affirmatively extended after the proposed Final Judgment's entry: (1) be in writing and signed by all parties thereto; (2) identify, with specificity, the collaboration to which the Agreement is ancillary; (3) be narrowly tailored to affect only employees who are anticipated to be directly involved in the Agreement; (4) identify with reasonable specificity the employees who are subject to the Agreement; and (5) contain a specific termination date or event. The purpose of Paragraph V(B) is to ensure that Agreements entered into pursuant to Paragraph V(A) are narrowly tailored and can be properly monitored by the United States.

[9] Paragraph II(C) defines "Agreement" to mean "any agreement, understanding, pact, contract, or arrangement, formal or information, oral or written, between two or more persons."

Defendants may have existing Agreements that contain No-Poach Provisions that may not comply with the terms of the proposed Final Judgment. To avoid the unnecessary burden of identifying and renegotiating these existing contracts, Paragraph V(C) of the proposed Final Judgment provides that Defendants are not required to modify or conform existing No-Poach Provisions that violate the proposed Final Judgment but shall not enforce them.

Finally, Paragraph V(D) of the proposed Final Judgment provides that a Defendant is not prohibited from unilaterally adopting or maintaining a policy not to consider applications from employees of another person, or not to solicit, cold call, recruit or hire employees of another person, provided that the Defendant does not (1) request, encourage, propose, or suggest that another person adopt, enforce, or maintain such a policy; or (2) notify the other person that the Defendant has adopted such a policy.

C. Required Conduct

Section VI of the proposed Final Judgment sets forth various mandatory procedures to ensure the Defendants are in compliance with the proposed Final Judgment. Paragraph VI(A) requires each Defendant to appoint an Antitrust Compliance Officer within ten (10) days of entry of the Final Judgment. Paragraph VI(B) then sets forth the steps that the Antitrust Compliance Officer must take in order to ensure the Defendant's compliance with the Final Judgment and make the Defendant's employees and recruiting agencies aware of its terms.

Specifically, Paragraph VI(B)(1) of the proposed Final Judgment requires that within sixty days of entry of the Final Judgment, the Antitrust Compliance Officer must furnish copies of the Competitive Impact Statement, the Final Judgment, and a cover letter explaining the

obligations of the Final Judgment to the Defendant's Management and HR Management.[10] Paragraphs VI(B)(3), (B)(5), and (B)(6) further require that the Antitrust Compliance Officer annually brief the Defendant's Management and HR Management on the meaning and requirements of the Final Judgment and the antitrust laws, obtain from each of them a certification that he or she has read and agreed to abide by the terms of the Final Judgment, and maintain a record of all certifications received.

In addition, Paragraph VI(B)(2) of the proposed Final Judgment obligates each Defendant to provide all of its U.S. employees reasonable notice of the meaning and requirements of the Final Judgment in a manner to be approved by the United States. Paragraph VI(B)(7) further requires the Antitrust Compliance Officer to annually communicate to the Defendant's employees that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of the Final Judgment or the antitrust laws.

To ensure that each Defendant's outside recruiters are aware of the proposed Final Judgment, Paragraph VI(B)(8) requires the Antitrust Compliance Officer, within sixty days of entry of the Final Judgment, to furnish copies of the Competitive Impact Statement, the Final Judgment, and a cover letter explaining the obligations of the Final Judgment to all recruiting agencies, or providers of temporary employees or contract workers, retained by the Defendant for recruiting, soliciting, or hiring efforts affecting the Defendant's business activities in the

[10] Paragraph II(D) of the Proposed Final Judgment defines "HR Management" as "the directors, officers, and human resource employees of the Defendant who supervise or have responsibility for recruiting, solicitation, or hiring efforts affecting the United States." Paragraph II(G) defines "Management" as "all officers, directors, and board members of Knorr-Bremse AG or Westinghouse Air Brake Technologies Corporation, or anyone with management or supervisory responsibilities for Knorr's or Wabtec's U.S. business or operations."

United States at the time of entry of the Final Judgment and during the term of the Final Judgment.

Pursuant to Paragraph VI(B)(9) of the proposed Final Judgment, the Antitrust Compliance Officer must furnish a copy of all materials required by Paragraph VI(B) of the proposed Final Judgment to the United States within seventy-five (75) days of entry of the Final Judgment.

Paragraph VI(C) of the proposed Final Judgment requires the Defendants to furnish notice of this action to the rail industry through the placement of an advertisement in an industry trade publication to be approved by the United States and the creation of website pages linked to the corporate websites of each Defendant for no less than one year.

Finally, Paragraph VI(D)(3) requires that the Chief Executive Officer or Chief Financial Officer, and General Counsel of each Defendant separately certify annually to the United States that the Defendant has complied with the provisions of the Final Judgment. Additionally, if Management or HR Management learns of any violation or potential violation of the terms of the Final Judgment, Paragraph VI(D)(1) and (D)(2) of the proposed Final Judgment obligate each Defendant to promptly take action to terminate the violation, maintain all documents relating to the violation, and, within sixty days, file with the United States a statement describing the violation.

D. Cooperation

Section VII of the proposed Final Judgment requires each Defendant to cooperate with the United States in any investigation or litigation examining whether or alleging that the Defendant entered into a No-Poach Agreement with any other person. Paragraph VII(A) requires each Defendant, upon request of the United States, to provide sworn testimony, produce

documents and materials, make employees available for interview, and testify in judicial proceedings about such No-Poach Agreements.

Paragraph VII(B) provides that, subject to each Defendant's truthful and continuing cooperation as defined in Paragraph VII(A), the United States will not bring further civil actions or criminal charges against that Defendant for any No-Poach Agreement with another person if the agreement: (1) was entered into and terminated before the date of the filing of the Complaint; (2) was disclosed to the United States before the filing of the Complaint; and (3) does not in any way constitute or include an agreement to fix wages, compensation, or other benefits. The purpose of Paragraph VII(B) is to incentivize each Defendant to provide the United States with all of the information it knows about potential No-Poach Agreements it may have entered into with additional counterparties.

E. Compliance

To facilitate monitoring of the Defendants' compliance with the proposed Final Judgment, Paragraph VIII(A) permits the United States, upon reasonable notice and a written request: (1) access during each Defendant's office hours to inspect and copy, or at the option of the United States, to require each Defendant to provide electronic or hard copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of each Defendant, relating to any matters contained in the proposed Final Judgment; and (2) to interview, either informally or on the record, each Defendant's officers, employees, or agents.

Additionally, Paragraph VIII(B), upon written request of the United States, requires each Defendant to submit written reports or responses to interrogatories relating to any of the matters contained in the proposed Final Judgment.

F. Enforcement and Expiration of the Final Judgment

The proposed Final Judgment contains provisions designed to promote compliance and make the enforcement of Division consent decrees as effective as possible. Paragraph X(A) provides that the United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including its rights to seek an order of contempt from the Court. Under the terms of this paragraph, the Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that the Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph X(B) of the proposed Final Judgment further provides that should the Court find in an enforcement proceeding that the Defendants have violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, in order to compensate American taxpayers for any costs associated with the investigation and enforcement of violations of the proposed Final Judgment, Paragraph X(B) provides that in any successful effort by the United States to enforce this Final Judgment against a Defendant, whether litigated or resolved prior to litigation, that Defendant agrees to reimburse the United States for any attorneys' fees, experts' fees, or costs incurred in connection with any enforcement effort, including the investigation of the potential violation.

Finally, Section XI of the proposed Final Judgment provides that the Final Judgment shall expire seven years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and the Defendants that the continuation of the Final Judgment is no longer necessary or in the public interest.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the *Federal Register*, or the last date of publication in a newspaper of the summary of this

Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the *Federal Register*.

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Defense, Industrials, and Aerospace Section
Antitrust Division
United States Department of Justice
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The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the Defendants. The United States is satisfied, however, that the relief proposed in the Final Judgment will prevent the recurrence of the violations alleged in the Complaint and restore competition between the Defendants and other firms for employees. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. US Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only

inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").[11]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (*quoting United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

[11] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004) *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[12] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also US Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also US Airways*, 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements) (citing *Microsoft*, 56 F.3d at 1461); *United States v. Alcan Aluminum Ltd.*, 605

[12] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also US Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing

or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also US Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the Court, with the recognition that the Court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[13] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *US Airways*, 38 F. Supp. 3d at 76.

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: April 3, 2018

[13] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D.Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

Respectfully submitted,

/s

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